

IN THE HIGH COURT OF TRIPURA
AGARTALA

R.S.A. No. 05 of 2010

Shri Dwijulal alias Dwijalal Das,
son of late Sashi Kumar Das,
resident of village-Ishanchandranagar,
P.S. Belonia, District- South Tripura.

..... **Appellant**

- V e r s u s -

Sri Pulin Behari Nath,
son of late Birendra Kumar Nath,
resident of village – Ishanchandranagar,
P.S. Belonia, District – South Tripura

..... **Respondent**

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the appellant : Mr. A. Dasgupta, Advocate

For the respondent : Mr. D. Chakraborty, Sr. Advocate
Mr. H. Laskar, Advocate.

Date of hearing and delivery : **20.03.2015**
of Judgment and order

Whether fit for reporting :

YES	NO
√	

JUDGMENT & ORDER (ORAL)

Heard Mr. A. Dasgupta, learned counsel appearing for the appellant as well as Mr. D. Chakraborty, learned senior counsel assisted by Mr. H. Laskar, learned counsel appearing for the respondent.

[2] This is an appeal under Section 100 of the C.P.C. challenging the legality of the judgment and decree dated

05.11.2009 delivered in Title Appeal No. 13 of 2009 by the Addl. District Judge, South Tripura, Belonia by reversing the judgment and decree dated 25.08.2009 delivered in Title Suit No.32 of 2006 by the Civil Judge, Jr. Division, Belonia, South Tripura.

[3] By the order dated 02.07.2010 when this appeal was admitted, the following substantial questions of law were formulated for consideration:

(i) Whether the Respondent could be allowed to file suits after suit against the Appellant on the same cause of action and if did so whether is all those suits would not be barred under Order -2 Rule 2 of the Civil Procedure Code?

(ii) Whether the Suit for perpetual injunction of the plaintiff (Respondent of the instant Appeal) is dismissed on contest on the ground that he was not in possession of the suit land had any right to file a fresh suit for recovery of possession of the suit land and if he did so whether would it not attract the section 11 of the code of civil procedure?

[4] The dispute involved in this appeal has a chequered history. A suit was initially filed by the present respondent for declaration of title and correction of Khatian in the year 1981 being Title Suit No. 16 of 1981 but the said suit was dismissed for default by the order dated 17.05.1982. Thereafter, the respondent filed another suit in the year 1984 being Title Suit No.57 of 1984 for declaration of title, permanent injunction and also for the correction of record of right. The said suit was dismissed by the judgment and decree dated 08.12.1994 holding that as the defendant proved that they are in possession of the suit land and as the entries in the

records of right are also in their name, it can be easily said that the defendants are in possession of the suit land. Based thereon, it has been held that the plaintiff is not entitled to get any relief as prayed for. By the suit under reference being Title Suit No.32 of 2006, the respondent had prayed the following reliefs:

(a) to declare the right, title, interest of plaintiff over the suit land.

(b) for recovery of possession of the suit land by way of evicting the defendant and his men or agent therefrom.

(c) for cost of the suit.

(d) any other relief/reliefs your honour deem fit and proper to granted to the plaintiff.

[5] There is no dispute that the suit land in Title Suit No.57 of 1984 subsequently renumbered as Title Suit No.57 of 1989 and the suit land in the Title Suit No.32 of 2006 is identical. It is not also in dispute that the appellant herein instituted another suit being Title Suit No.02 of 1999 for declaration of right, title and interest by adverse possession, permanent injunction restraining the respondent from entering into the suit land and for correction of Khatian and consequential reliefs. It is not also in dispute that the suit land in Title Suit No.02 of 1999 is also the same suit land. The said suit being Title Suit No.02 of 1999 has been dismissed by the Civil Judge, Jr. Division, Belonia, South Tripura by the judgment and decree dated 09.04.2003 holding that:

Plaintiff of this suit prayed for a decree for directing to the Revenue Authority for mutation of the name of the plaintiff in the

suit Khatian by deleting the name of Late Birendra Kr. Nath who is the father of the Defendant from column No.13 of Khatian No.215. Exbt.1 is the Khatian No.215 and column No.13 relates with the description as well as possession in details in respect of the actual owner of the land. But in discussing and deciding to the Issue No.(iii) along with the Issue Nos. (i) and (ii) it is found that plaintiff acquired no right, title and interest over the suit land by way of adverse possession and as such plaintiff of this suit is not entitled to get a decree of mutation of his name in the record of rights.

[6] It is also not in dispute that the appellant as the plaintiff of the suit being Title Suit No.02 of 1999 did not challenge the said judgment and decree either by preferring appeal or by any other means. Hence, the said finding as returned by the Civil Judge, Jr. Division, Belonia, South Tripura reached its finality.

[7] Having this backdrop into consideration, two substantial questions of law as framed by this Court are required to be answered. The fundamental questions that would frame in both the questions is that whether the suit filed by the plaintiff being Title Suit No.57 of 1984 renumbered as Title Suit No.57 of 1989 would create an embargo for institution of the subsequent suit which has been so filed for recovery of the possession of the suit land. The provisions of Order II Rule 2 of the C.P.C. in this regard may be revisited :

2. Suit to include the whole claim.- (1)
Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim—Where

a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation: For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

Apart that, the principles of *res judicata* has been sought to be invoked for questioning the maintainability of the suit in view of Section 11 of the C.P.C. which provides that '*no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.*'

Explanation IV may have some bearing in the context of the case. *Explanation IV* below to Section 11 of the C.P.C. provides that '*any matter which might and ought to have been made ground, defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit*'.

[8] There is no controversy that in the former suit, the plaintiff sought for the confirmation of possession and that relief since was not allowed by the court, the entire suit was dismissed. But there had been no challenge against the title of the plaintiff in that suit. In this suit, the plaintiff has sought the recovery of the possession based on his title. Whether in the former suit, the relief of recovery of possession might or ought to have been made or for not advancing such relief should it be treated as omission within the meaning of Order II Rule 2 of the C.P.C?

[9] Mr. A. Dasgupta, learned counsel appearing for the appellant has emphatically submitted that it was within the knowledge of the plaintiff that the appellant, the defendant in the suit was in possession of the suit land. Therefore, he ought to have made that relief. As such, that relief has to be considered as relinquished and in view of Order II Rule 2 of the C.P.C., the relief once is relinquished cannot be advanced by filing a subsequent suit, without due leave.

[10] From the other side, Mr. D. Chakraborty, learned senior counsel appearing for the respondent, the plaintiff in the suit, has submitted that the relief of recovery of the suit land could not be made as the part of the whole claim in the former suit and hence cannot be treated as the relief relinquished by the plaintiff. On the face of the declaration of the competent court that the appellant, the defendant in the suit, has no right by prescription, the plaintiff got

the fresh cause of action to recover his land and the suit filed subsequently cannot be held hit by the provisions of Order II Rule 2 of the C.P.C. or by Section 11 *Explanation IV* of the C.P.C.

[11] If the whole claim does not include the recovery of the possession of the suit land, whether that may create a bar for the subsequent suit under Order II Rule 2 of the C.P.C. The object of Order II Rule 2 of the C.P.C. is to deter those persons who might vex the court twice for the same cause of action. The apex court in **State of Maharashtra and another vs. M/s. National Construction Company, Bombay and another**, reported in **(1996) 1 SCC 735** has held that:

17. In *Sidramappa vs. Rajashetty: (1970) 1 SCC 186*, this Court held that where the cause of action on the basis of which the previous suit was brought, does not form the foundation of the subsequent suit, and in the earlier suit, the plaintiff could not have claimed the relief which he sought in the subsequent suit, the plaintiff's subsequent suit is not barred by Order 2 Rule 2. Applying this ruling to the facts of the present case, it is clear that, in the first suit, the appellants could only claim reliefs in respect of Rs. 14,12,836 which was the maximum amount stipulated in the performance guarantee. They could not have claimed reliefs of Rs. 1,13,27,298.16 which they did in the second suit on the basis of the contract relating to the work to be performed by the contractor.

As the finding as to the nature of possession held by the appellant, the defendant in the suit, has reached its finality that he is not on adverse possession in the suit land, the right to recovery of land from his possession continues. The prescription under Section

27 read with Article 65 of the Limitation Act can only be made applied when the possession becomes adverse against the true owner otherwise, the true owner will be competent to recover the possession from the unauthorized possessor at his discretion at any time. The finding returned by the judgment in the suit being Title Suit No.02 of 1999 has given a fresh cause of action to the plaintiff, the respondent in this appeal. For this purpose, the legislative change has been brought in the Limitation Act, 1908 by way of the Limitation Act, 1963. Earlier the concept of maturing the title on possession was that immediately after lapse of 12 years of continuous possession, title of the true owner so far the private jote land is concerned, extinguished and would lose his/her right to recover the land. The purpose of the legislative change is obvious. It is to protect the right and title of the true owner over the land. New enactment embodies the public policy to confer the right by prescription on the squatters, if it is proved that possession was adverse beyond the period of limitation.

Having regard to what has been held herein above, this Court does not find any merit in this appeal and accordingly, it stands dismissed.

Prepare the decree accordingly.

Send down the LCRs thereafter.

JUDGE

Sujay